IN THE

Supreme Court of the United States

1109

No. —— October Term, 1941

EDWARD MONTGOMERY,
Petitioner-Defendant

vs.

UNITED STATES OF AMERICA,
Plaintiff-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

JACOB WEINSTEIN
742 Real Estate Trust Bldg.,
Philadelphia, Pa.,
Attorney for Petitioner.

MICHAEL SERODY, ESQ.,
Of Counsel,
1217 Bankers Securities Bldg.,
Philadelphia, Pa.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.
Joseph M. Mitchell, Philadelphia County Representative, 5738 Thomas Avenue, Philadelphia, Pa.

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MISCELLANEOUS

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vs.
United States of America
Plaintiff-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward Montgomery, in support of the petition for a certiorari, to be directed to the United States Circuit Court of Appeals for the Third Circuit, to review a judgment rendered the sixth day of March 1942, which affirmed the judgment and sentence of the United States District Court for the District of New Jersey entered the 11th day of July 1941, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

1. That on the 28th day of March 1939, the Grand Jury of the United States inquiring for the District of New Jersey, returned an indictment against your petitioner and others being No. 8728 B in that District, alleging and charging, that your petitioner and said other persons, with the crimes of violating sections 1184, 1162, 1185 and 1441 of title 26 U.S.C.A., of defrauding the United States of tax, possessing an unregistered still, fermenting mash and removing, etc. the still spirits for which the tax remained unpaid.

2. At the third trial of the cause held on May 14-15, 1941 at Camden, New Jersey, before the Honorable John Boyd Avis, D. J., evidence was introduced by both sides which tended to establish the following facts:

That some considerable time prior to February 4, 1937, the defendant, Michael Giannini, for principals whose identity was not revealed, set up and operated an illegal still at Bellmawr, New Jersey, which produced bootleg whiskey for general consumption, some of which was sold by Giannini to the petitioner-defendant, Edward Montgomery, who was a distributor of such whiskey in the southwestern part of the City of Philadelphia. Giannini, the defendant Michael DeLeone and his brother, Leo DeLeone, all living in the same general neighborhood with the petitioner-defendant, Edward Montgomery, in that section of the city.

The Government's evidence tended to prove that for some undisclosed reason the Bellmawr operations terminated, so that a short time prior to the 4th day of February,

1937, the defendant Hoffman and petitioner-defendant Montgomery, conceived a plan to set up another illegal still in New Jersey, reasonably close to Philadelphia, and to that end Montgomery delegated Hoffman to procure the cooperation of the defendant Giannini, who in turn should employ the defendants, Vitullo, DeStifano and Sacripanti, some related to Giannini and all his former employees in the Bellmawr enterprise. Giannini found the proposed project acceptable and accordingly a search was begun for a practical site. The evidence leaves some doubt as to who discovered the site but it is plain that such a locale was discovered. This was the so-called Hovis Farm located in Glouster Township, Camden County, New Jersey, being owned by a farmer named George B. Hovis, a co-indictee herein, who died prior to the present trial. In order to facilitate the erection and operation of the project on the Hovis Farm, the defendant Giannini, as his residence rented another farm about a mile distant from the Hovis place, known as the Borinquin Farm, to which Giannini removed his family from Bellmawr. There is no evidence that the petitioner-defendant ever visited either farm or was ever in New Jersey while any of the alleged illegal acts or omissions were under way, it being the Government's theory, predicated on Giannini's testimony, that Montgomery was the financial angle who set the transaction in motion, supervision of the enterprise upon the ground being the task of the defendant Hoffman. The petitioner-defendant, Montgomery, admitted that there were financial dealings between himself and the defendant Giannini, which took the form of loans by the former to the latter, and that he made purchases of whiskey from time to time from Giannini, but that he had no knowledge of the origin of such whiskey and that aside from this he was in no manner interested or concerned in Giannini or the Hovis Farm.

The evidence fails to show that Montgomery, the petitioner-defendant, ever purchased or had the opportunity of receiving any of the Hovis Farm product, because the operations there were relatively short lived, for the reason that on February 4, 1937, the Hovis Farm was raided and the still seized by Government agents, incidental to which, at least Giannini, DeStifano, Vitullo and Sacripanti were arrested on the ground, but the petitioner-defendant, Montgomery, was never arrested in these alleged offenses until about eighteen months after the raid.

In this eighteen month interval, Giannini made many visits to Montgomery at the latter's home in Philadelphia for the principal purpose of obtaining money from Montgomery, which purpose succeeded on several occasions, in the form of obtaining loans which remained unpaid, and when these visits as they finally did turn out to be financially unproductive, Giannini declared to Montgomery that he Giannini, if no more money was forthcoming, would put Montgomery in the case; viz.: that Giannini would turn informer. It also appears in the evidence incidental to one of Giannini's unsuccessful quests for money at the Montgomery home, that one of Mrs. Montgomery's diamond rings disappeared which later turned up in a Philadelphia pawn shop.

It is also inferable that when Montgomery finally declined to give more money to Giannini, he did turn informer in consequence of which at that belated period Montgomery was ultimately arrested and indicted on the strength of Giannini's information.

Giannini, being a confessed accomplice, the Government realizing the need for corroboration thereupon produced another co-indictee, the defendant, Michael DeLeone to corroborate Giannini. Thereafter Leo DeLeone, brother of Michael DeLeone was called as a rebuttal witness, and

his testimony, in substance and effect, was that Montgomery warned Michael DeLeone to avoid implication by staying away from the Hovis Farm, and that Michael DeLeone then tried to induce Montgomery to take steps to procure the release of the other defendants who were then in custody, which Montgomery agreed to do after a short time had elapsed.

In the cross examination of Leo DeLeone, for the purpose of impeachment, Montgomery's counsel endeavored to elicit from Leo DeLeone, that Leo had been convicted of a misdemeanor for the desertion of his wife and children in Philadelphia, which cross-examination the learned trial judge declined to permit.

During the examination of the petitioner-defendant, Montgomery in order to show bias of the Government's mainstay, Michael Giannini, Montgomery testified that about a month before the first trial of this case, Montgomery had occasion to be in the neighborhood of Eighth and Wharton Streets, in Philadelphia. That upon this occasion he was sitting in his automobile in conversation with his co-defendant, Joseph Hoffman, and while this was proceeding the defendant, Michael Giannini, after walking south on Eighth Street first engaged in a brief conversation with Hoffman in which Montgomery did not participate. This silence apparently irked Giannini to the point of making him angrily inquire of Montgomery what ailed Montgomery and if Montgomery thought that he was better than Giannini, in response to which Montgomery said that he wanted nothing whatever to do with him. This brought on a violent quarrel between them which culminated in a fist fight in the course of which Giannini drew a revolver and attempted to use it, but for the intercession of Hoffman and a third man named Angelo, who separated the combatants and hustled Giannini away in Hoffman's automobile. Montgomery main-

tained both in direct and cross examination that this fracas was merely a coincidence and not the result of an antecedent arrangement for a meeting between the persons involved.

To neutralize the narrative under claim of rebuttal the Government recalled Michael Giannini and over objection tried to prove that this meeting had been arranged by Montgomery to enable him to suborn Giannini by paying Giannini to testify falsely.

At the conclusion of the evidence upon a charge, Avis, D. J., which was not excepted to, the jury returned a verdict of guilty on counts one and two and not guilty on count three against the petitioner-defendant, Montgomery, and on all counts against Hoffman in consequence of which sentence was imposed on July 11th, 1941, on count one of the indictment, upon which a fine of $500.00 and eighteen months' custody of the Attorney General etc., was imposed, and on count two of the indictment a fine of $500.00 and penalty of $500.00 and eighteen months' custody of the Attorney General was imposed, said terms of imprisonment to run concurrently, making eighteen months in all, and to stand committed until the fines were paid. Count one charging the violation of title 26, section 1184 and count two charging violation of title 26 section 1162. Seasonable motions in arrest of judgment and for a new trial were filed May 19, 1941 which motions were denied on June 23, 1941, which memorandum opinion has been printed in full in the record herein.

Thereafter the 14th day of July, 1941, notice of appeal and assignments of error were duly filed.

3. The petitioner thereupon on the 14th day of July, 1941, duly perfected his appeal to the United States Court of Appeals for the Third Circuit, where the appeal was identified as of October term, 1941 No. 7847.

4. That thereupon after sundry proceedings in the said cause, the same was argued in the United States Court of Appeals for the Third Circuit (Coram Clark, Jones Cir. JJ and Ganey DJ) which tentatively affirmed the said judgment and sentence against the petitioner on the sixth day of January, 1942 by opinion filed per Jones, Circuit Judge, on said date (Record p. 29).

5. That by reference to the said opinion of the said Court filed on said sixth day of January 1942 aforesaid, it will inter alia appear pertaining and concerning the contention of the petitioner in regard to certain proposed cross examination of the Government's witness Leo DeLeone, that the said Circuit Court of Appeals determined and adjudicated as follows:

> "Finally, the appellant argues that the trial court erred in refusing him leave to impeach the credibility of a government witness by showing that the latter has been convicted of a misdemeanor in Pennsylvania for deserting his wife and children. In stressing this point the appellant apparently conceives that the matter is to be determined by the current law of New Jersey, the situs of the federal forum. In this he is mistaken. Long ago the Supreme Court said that 'the law by which * * * the admissibility of the testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789.' United States vs. Reid, et al., 53 U. S. (12 How.) 361, 363. The present question, therefore, is to be resolved, not by the law of New Jersey as it exists today, but by the law of New Jersey as it existed in 1789 and by any rules of evidence since enacted by the Congress or adopted by federal courts from the common law as being applicable in the administration of federal criminal statutes.

See Melaragno v. United States, 88 F. 2d 264, 265 (C.C.A. 3).

There was no statute in New Jersey prior to 1789 with respect to impeaching the credibility of a witness by showing his prior conviction of crime, and no early decisions by the courts of that state in such regard are cited. This is quite understandable, for New Jersey had a statute (Act of June 7, 1779) which rendered incompetent as a witness a person convicted of any of a number of specified crimes. In ascertaining what the law of New Jersey was in 1789 with respect to the impeachment of a witness by showing his prior conviction, the subsequent and present law of the state is helpful, not as in any wise controlling but in implying the grade of crimes capable of stigmatizing veracity. It will be observed that the crimes listed in the Act of 1779 (which worked a guilty person's incompetency as a witness) did not include crimes of lesser degree such as disorderly conduct or other minor breaches of the peace or crimes which are considered crimes largely because the redress for the offense is ordinarily obtained through criminal process, such as a charge of non-support. Nor do we find desertion listed in that statute. This discrimination as to the degree of the crime necessary to impeach credibility is confirmed by subsequent decisions of the courts of New Jersey. In keeping with the more liberal trend in most jurisdictions, the legislature of New Jersey in 1871 emancipated indicted defendants and made them competent to testify. Then, in 1874, an act was passed making any person convicted of a crime competent to testify in his own behalf but providing that the prior conviction could be shown to affect his credibility. While the word 'crime' as used in that statute was later construed to mean any crime (State v. Henson, 66 N.J.L. 601, 50, Atl. 468, 469), subsequent

decisions of New Jersey courts plainly indicate that the all-embrasive definition given to the word 'crime' in the case last above cited is subject to some restriction. For instance, a conviction in a summary proceeding for reckless driving has been held not to be a crime within the meaning of the Act of 1874, Huff v. C. W. Goddard Coal & Supply Co. et al., 106 N.J.L. 19, 21, 148 Atl. 175, 176 (N.J. Sup. Ct.); nor a conviction for driving an automobile while under the influence of intoxicating liquor, Thomas et al. v. Devine, 104 N.J.L. 361, 364, 140 Atl. 324, 325 (N.J. Ct. of Err. & App.); nor a conviction as a disorderly person, State v. Block, 119 N.J.L. 277, 282, 196 Atl. 225, 229 (N.J. Sup. Ct.).

It is our opinion that if the question here involved were raised in a competent court of New Jersey, the offense of desertion would not be deemed to be such as to effect the offender's credibility. In thus referring to the present law of New Jersey we do so not because it is of influence in the application of a federal criminal statute by a federal court sitting in that state, but because it is declaratory of the law of New Jersey which in the absence of a showing to the contrary may be presumed to have been the common law of New Jersey.

But in addition to what we believe the pertinent law of New Jersey to have been, the rule generally as applied by federal courts in trials under federal criminal statutes is that it is only a conviction of a felony or a misdemeanor amounting to crimen falsi which is admissible to impeach credibility. The crime of desertion falls within neither of these categories. It is not a felony (being specifically denominated a misdemeanor), nor is it a misdemeanor which amounts to crimen falsi. The law could hardly impute unworthiness

of belief to one of the parties to marital differences merely because of such differences. We therefore conclude that the learned trial judge did not err in excluding the evidence which the defendant proferred for the impeachment of the witness Leo DeLeone.

The judgment of the District Court is affirmed."

6. The petitioner deeming the foregoing proposition of law erroneous and an infringement of his legal right, to have the said Court below review and reverse the cause for error, thereupon, on the 20th day of January 1942 filed a petition for re-hearing and a brief in support of said petition (Record p. 36) in consequence of which on the sixth day of March 1942 said Court entered a document entitled "Order", in and by which said Court struck out that portion of the opinion quoted, mentioned and described in paragraph 5 hereof and in lieu thereof held, adjudicated and determined that,

"And now, to wit, March 6, 1942, the opinion filed in the above entitled matter for this court on January 6, 1942, is hereby amended by deleting therefrom the matter beginning with 'Finally, the appellant argues', etc., on page 5 of the printed opinion, and continuing to the end of the opinion, and by substituting in lieu thereof the following:

Finally, the appellant contends that the trial court erred in refusing him leave to impeach a witness for the prosecution by showing that the latter had been convicted of deserting his wife and children in Pennsylvania where that particular offense is denominated a misdemeanor. In this connection, the appellant argues that, as the offense of desertion was likewise a misdemeanor at common law in New Jersey, at the time of the adoption of that state's constitution on September 2,

1844, and, later, by state statute enacted in 1937, a conviction for the same character of misdemeanor which the state law thus denounces may be used in a trial in New Jersey to stigmatize the offender's credibility. In so contending, the appellant quite evidently assumes that this question of evidence, in the trial of a federal criminal case, is to be resolved by the law of the state wherein the trial is held. So far as the rule upon which the appellant relies resides in New Jersey law made or enacted since 1789, it is of no effect upon the rules of procedure or evidence in the trial of a federal criminal case. Long ago the Supreme Court said that 'no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in (federal) criminal cases'. United States v. Reid, 53, U. S. (12 How.) 361, 366. While the Reid case has since been considerably restricted or altered with the respect to the binding effect in federal criminal trials of the state law as it existed in 1789 the rule declared in the Reid case as hereinabove quoted has never been derogated in principle. In no event, therefore, did the learned trial court in the instant case err in declining to be bound by the rule of evidence which the appellant advanced on the basis of New Jersey law made since 1789.

As to the law of New Jersey as it existed in 1789, the appellant points us to no pertinent rule of that state with respect to the impeachment of a witness by showing his prior conviction of crime. In fact there was then no occasion for a ruling in such regard. Quite generally in 1789 convicted persons were incompetent as witnesses. Consequently the question of their credibility or the method of impeaching it did not arise in practice. But even if New Jersey had had such a rule of impeachment in 1789 a federal court sitting in that state would no longer be bound thereby in the trial of a

criminal case. It is in that particular that the effect of the Reid case has been changed by later decisions.

In Benson v. United States, 146 U. S. 325, 335, where the question of a witness' competency arose in a federal court sitting in Kansas, the Supreme Court proceeded to examine 'In the light of general authority and sound reason' the question of evidence there presented. (The further ruling of the Reid case as to the binding effect of state law as it existed in 1789 was later imputed by Logan v. United States, 144 U. S. 263, 303, to state law as it existed at the time of the particular state's admission to the Union after 1789). However the binding effect in a federal criminal trial of state law either as it existed in 1789 or upon a state's later admission to the Union, was not directly involved in the Benson case. There the appellant had sought to use the decision in the Reid case as a ruling that in a federal court a co-defendant is incompetent as a witness.

But the question whether state law as it existed in 1789 is any longer binding upon a federal court in the trial of a criminal case came squarely before the Supreme Court in Rosen v. United States 245, U. S. 467, 470-471, and was answered in the negative. In the Rosen case, the defendant's objection to a witness' competency because of a prior conviction for forgery would have been sustainable if the common law of New York, as it existed in 1789 still controlled, but the District Court overruled the objection and permitted the witness to testify, thus denying any effect in the federal trial to the New York common law of 1789. The Court of Appeals approved the action of the District Court and, on certiorari, the Supreme Court affirmed the lower courts. In so doing, the Supreme Court again

considered the question of competency 'in the light of general authority and sound reason' and, being satisfied 'that the legislation and the very great weight of judicial authority which have developed in support of this modern rule (as distinguished from the New York common law rule) especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle', the Supreme Court further concluded, p. 471 'that the dead hand of the common law rule of 1789 should no longer be applied to such cases as we have here' (question of evidence in federal criminal cases).

The effect of the decision in the Rosen case was further interpreted by the Supreme Court in Funk v. United States, 290 U. S. 371, 379, where the court said 'With the conclusion that the controlling rule is that of the common law, the Benson case and the Rosen case do not conflict; but both cases reject the notion, which the two earlier ones (Reid case and Logan case) seem to accept, that the courts, in the face of greatly changed conditions, are still chained to ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions.' Then followed Wolfle v. United States, 291 U. S. 7, wherein the Supreme Court said, p. 12, that 'During the present term this Court has resolved conflicting views expressed in its earlier opinion by holding that the rules governing competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state (California in that case) where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.'

It may therefore be taken as the rule that in the trial of criminal cases federal courts are bound by such rules of procedure and evidence as Congress prescribes and such further rules as the federal courts have adopted or from time to time may adopt in the light of general authority and sound reason. So treating with the question raised in the instant case, we believe the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, to be that it is only convictions for felony or misdemeanors amounting to crimen falsi which are admissible to impeach a witness' credibility The crime of desertion falls within neither of these categories. It is not a felony (being specifically denominated a misdemeanor), nor is it a misdemeanor which amounts to crimen falsi. The law would hardly impute unworthiness of belief to one of the parties to marital differences merely because of such differences. The fault in such regard might not even lie with the one sought to be impeached. We therefore conclude that the learned trial judge did not err in excluding the evidence which the defendant proferred for the impeachment of the witness Leo DeLeone.

The judgment of the District Court is affirmed" (Record p. 51).

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The basis of the petitioner's several complaints predicated on the facts aforesaid are as follows:

1. That the Circuit Court of Appeals for the Third Circuit, by the judgment under review, contrary to the

decisions of this Court and decisions of Circuit Courts of Appeal for other Circuits and the general law, holds and adjudges that impeachment of witnesses by reason of antecedent criminal acts or omissions can only be predicated on such criminal acts or omissions as are crimen falsi.

2. That the Circuit Court of Appeals for the Third Circuit, by the judgment under review, contrary to the decisions of this Court, the Circuit Courts of Appeal for other Circuits and the general law, holds and adjudges that the desertion of wife and children made a misdemeanor by statute and made punishable by fine and imprisonment does not constitute moral turpitude having the attribute to impeach the credibility of a witness who has been adjudged guilty of such offense.

3. That the Circuit Court of Appeals for the Third Circuit, by the judgment under review, contrary to decisions of this Court, the decisions of Circuit Courts of Appeal for other Circuits and the general law, holds and adjudges that at the time of trial of the present cause crimes denominated crimen falsi existed and afforded the sole basis of impeachment of witnesses by reason thereof.

4. That the Circuit Court of Appeals for the Third Circuit, by the judgment under review, contrary to the decisions of this Court, the decisions of Circuit Courts of Appeal for other Circuits and the general law, holds that the impeachment of credibility of witnesses is limited in so far as antecedent criminal acts or omissions on their part is concerned only to acts denominated crimen falsi and involving moral turpitude.

5. That the Circuit Court of Appeals for the Third Circuit, contrary to the decisions of this Court, holds and adjudges that a record of conviction in a criminal case does not show the culpability of the convict involved therein.

6. That the Circuit Court of Appeals for the Third Circuit, by the judgment under review, contrary to Section 1 of Article 4 of the Constitution of the United States, denies full faith and credit to the record of the Domestic Relations Court in Philadelphia, in the State of Pennsylvania disclosing the conviction of the Government's witness Leo DeLeone for the misdemeanor of desertion of his wife and children.

Wherefore, your petitioner respectfully prays:

That a writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings in the cause to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief as to this Court may seem proper and be in conformity with law.

And your petitioner will ever pray.

EDWARD MONTGOMERY,
Petitioner.
By JACOB WEINSTEIN,
Attorney for Petitioner.

MICHAEL SERODY, ESQ.,
Of Counsel.

United States of America,
Eastern District of Pennsylvania, ss:

Jacob Weinstein, being duly sworn according to law, deposes and says that he is Attorney for the above named Petitioner; that he prepared the foregoing Petition; and

that the allegations contained therein are true to the best of his knowledge, information and belief.

sgd. Jacob Weinstein
JACOB WEINSTEIN.

Sworn to and subscribed this 2nd day of April, 1942.

Mary B. Kasher (seal)
Notary Public
My commission expires
April 2, 1945

BRIEF IN SUPPORT OF PETITION

I.

THE OPINIONS OF THE COURTS BELOW

(a) The Honorable John Boyd Avis, D. J. filed a memorandum opinion sur motion for a new trial (Record p. 12) as this is written it is still unreported.

(b) The Circuit Court of Appeals for the Third Circuit filed an opinion on the 6th day of January 1942 per Jones Circuit Judge (Record p. 29) as this is written it is still unreported.

(c) The Circuit Court of Appeals for the Third Circuit filed an opinion entitled "Order" amending and modifying the above opinion on the 6th day of March 1942 per Jones, C. J. (Record p. 51) as this is written it is still unreported.

II.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 347 of 28 U. S. C. A., being Section 240 of the Judicial Code as amended (March 3, 1891, Chapter 517, Section 626 Stat. 828; March 3, 1911, Chapter 231, Section 240, 36 Stat. 1157; February 13, 1925, Chapter 229, Section 1, 43 Stat. 938), and Section 723a, 28 U. S. C. A. 48 Stat. at Large 926, Chapter 49, p. 399, March 8, 1934—47 Stat. at Large 904, Chapter 119, page 904, February 24, 1933—Rules of the Supreme Court of the United States adopted May 7, 1934, (292 U. S. 661).

III.

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals for the Third Circuit erred in affirming the judgment and sentence of the United States District Court for New Jersey No. 8728 B (Record p. 35).

2. The United States Circuit Court of Appeals for the Third Circuit upon re-hearing erred in affirming the judgment and sentence of the United States District Court for the District of New Jersey No. 8728 B (Record p. 55).

3. The United States Circuit Court of Appeals for the Third Circuit erred in overruling all and sundry the Petitioner's assignments of error filed in the said Court sur the appeal herein (Record p. 35).

4. The United States Circuit Court of Appeals for the Third Circuit upon re-hearing erred in overruling all and sundry the petitioner's assignments of error filed in said Court sur the appeal herein (Record p. 55).

IV.

STATEMENT OF THE CASE

In an endeavor to avoid repetition and to keep this brief within reasonable dimensions, the petitioner will not at this place repeat the elaborate narrative concerning the evidence adduced at the third trial of this case because it is found set out in paragraph 2 of the Petition for Certiorari ante. It is however necessary to state, that now, since the only serious question remaining in the record of the Court below which forms the sole foundation of the present Petition for Certiorari, that, that part of the record will receive at this place specific care and elaboration. This task is neither as simple or easy as it might be, because of the latest revision of the rules of the Court below which requires and insists that so far as testimony is concerned none be printed in the record except that which bears directly upon the assignments of error intended to be pressed in that Court. As a result of this requirement the entire testimony adduced at the trial was not printed in the record of the Court below and consequently can not be referred to here. It, therefore, becomes essential by way of explanation to supply by way of narrative some preliminary exposition as to what this missing testimony tended to show. It was the theory of the petitioner's defense that he was in no wise concerned in the operation and setting up of the still which was the subject of the prosecution and that he had no connection with it or even had knowledge that it existed, he being a mere customer of certain of the defendants for the purpose of retail sale and distribution in the southwestern part of the City of Philadelphia. On the other hand it was the Government's contention that the

petitioner was the financial support of the enterprise and hence the principal participant. To further the Government's theory it produced one of the co-defendants, Michael DeLeone, to prove that after the arrest of Michael and some other of the defendants and the seizure of the still by the Government agents, a meeting was had at Montgomery's house in Philadelphia at which Michael DeLeone and his brother Leo DeLeone, whom the Government did not indict or implicate, for the purpose of having the petitioner Montgomery interest himself in the defense of those arrested. Montgomery, at that time had not been arrested in connection with the transaction. Therefore, to strengthen and corroborate the testimony of Michael DeLeone, touching this incident, and after Montgomery's denial thereof in his defense, the Government in rebuttal called the witness Leo DeLeone to achieve the corroboration of his brother Michael, and by this devise to reinforce the Government's theory of the petitioner Montgomery's guilty implication. Thus it was manifest that the credibility of Leo DeLeone became basic and consequently any assault on that credibility became highly important to the petitioner's defense. Consequently, we think, that this is as fitting a place as any to enlarge upon the exact situation bearing upon the subject as it transpired in the course of Leo DeLeone's cross-examination. That cross-examination by the petitioner's counsel which is the basis of all the petitioner's contention here proceeded as follows:

"Q. Are you married?

A. Yes, sir.

Q. Do you have any children?

A. Yes, sir.

Q. Does your wife and children live with you?

A. No, sir.

Mr. Schalick: I enter an objection. Not proper cross-examination.

The Court: I don't think that is any cause for affecting the witness' credibility. Sustain the objection and strike the answer.

Q. You were also arrested in 1938 for non-support?

Mr. Schalick: I enter an objection.

Mr. Serody: It goes to credibility.

The Court: Not the question of an arrest. Sustain the objection.

Q. You were convicted and an order was made against you by the Domestic Relations Court of Philadelphia?

Mr. Schalick: I enter an objection.

The Court: Sustained. We cannot try marital matters here." (Record p. 27)

It will be seen that this restriction of cross-examination became one of the subjects of the motion for a new trial, the memorandum opinion of the trial judge and assignments of error, the original opinion of the Court below and its opinion upon re-argument (Record pp. 12, 29 and 51) and to repeat, by a process of elimination is the exclusive foundation of all the questions earnestly pressed by the petitioner in this petition.

V.

ARGUMENT

(A) That the theory of crimen falsi as a factor limiting cross examination to test credibility is not law.

It is plain that at the end of the eventful and strenuous journey that this case has had in the Courts below, its final resolution is found in the concluding paragraphs of the opinion of the Court below entered upon the application for a re-hearing, manifesting the success of the petitioner in inducing the Circuit Court of Appeals to reject its earlier evidently untenable position and planting itself behind this last bastion. We quote again (Record p. 54):

> "It may therefore be taken as the rule that in the trial of criminal cases federal courts are bound by such rules of procedure and evidence as Congress prescribes and such further rules as the federal courts have adopted or from time to time may adopt in the light of general authority and sound reason. So treating with the question raised in the instant case, we believe the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, to be that it is only convictions for felony or misdemeanors amounting to crimen falsi which are admissible to impeach a witness' credibility. The crime of desertion falls within neither of these categories. It is not a felony (being specifically denominated a misdemeanor) nor is it a misdemeanor which amounts to crimen falsi. The law would hardly impute unworthiness of belief to one of the parties to marital differ-

ences merely because of such differences. The fault in such regard might not even lie with the one sought to be impeached. We therefore conclude that the learned trial judge did not err in excluding the evidence which the defendant proferred for the impeachment of the witness Leo DeLeone.

The judgment of the District Court is affirmed." (Record p. 55)

We submit that the Court below would have not made this declaration had it appreciated the existence in this Court of the case of

Tla-Koo-Yel-Lee vs. U. S., 167 U. S. 276-277 (1896).

which we submit by the process of negation demonstrates the non-existence of the crimen falsi notion in criminal trials in federal courts.

That was an appeal from a conviction for homicide coming here from the District Court of the Territory of Alaska and this Court's opinion was delivered by Mr. Justice Peckham. In the reported case the Government's principal witness was an Indian woman, and it is inferable from the opinion and appears from the record which the writer has examined, that, at the time of her testimony she was a married woman. To assail her credibility defendant's counsel endeavored on cross-examination by direct interrogation of the witness to reveal that she presently sustained adulteress relations with another Indian not her husband. Upon an objection, the trial court prevented this interrogation and it was assigned for error in this Court. Mr. Justice Peckham held that the inquiry was entirely proper for the purpose intended and the judgment was reversed. The opinion contains not a syllable or intimation concerning crimen falsi and as at this writing there is avail-

able to the writer no copy of the criminal code of Alaska operating in 1894 the date the case was tried. The writer nevertheless takes the hazard of asserting that the code of Alaska did not make adultery at that time a felony which some Courts have thought to be the inevitable basis of the crimen falsi bedevilment of which more hereafter.

Do we overlook the element of moral turpitude in the cited case? We do not, but reserve it for further attention.

What then is crimen falsi?

A learned federal judge has pointed out that there can be no crimen falsi where the conviction does not render the convict incompetent to testify

U. S. vs. Baugh, 1 Fed. 787 (1880).

and this is likewise the conclusion of the celebrated Sir William Scott in

The Ville deVarsovie, 2 Dodson 188-165 Reprint 1457 et seq. (1817).

and indeed that eminent Judge in the same case holds that at common law crimen falsi is undefined and undefinable.

Idem.

So, the fundamental is, the ascertainment of incompetency of the convict by reason of conviction. For, it appears to us unescapable, if no such incompetency exists, the concept of crimen falsi falls for the want of a foundation. The goal being so fixed, the inquiry therefor is, did, at the time of the trial in the Trial Court, there exist in the relevant jurisdiction, the States of New Jersey and Pennsylvania and the Federal Court in the latter State, any incompetency by reason of the conviction for crime. Observe, a little in the reverse order, that in the Federal Court the

doctrine of disqualification of convicts to testify because of conviction is expressly repudiated

Rosen vs. U. S., 245 U. S. 467 (1918).

and in New Jersey the same result is achieved by force of express statutory enactment.

2 *N. J. S. A.* 97-1.

And except in the case of a convicted perjurer the result is the same in Pennsylvania.

Comm. vs. Clemmer, 190 Pa. 202, 42 Atl. 675 (1899);

19 *Purdon*, Section 681-682.

Thus we believe, in the present record, the factor of crimen falsi never could have any operation, having shown that the doctrine is bedded in incompetency and that such incompetency has been swept away by force of the principles enunciated in the statutes and the cases referred to, or to restate it tersely, where there can be no incompetency there can be no crimen falsi. Thus, the principle, involved here, cannot be confined in this imaginary category as is attempted by the Court below, and other cases, to which it refers as in majority, but does not by other means identify.

This is the appropriate place, we think, having freed ourselves of the bogey of crimen falsi, to discover what are the true limits to impeachment of credibility of a witness at common law, and here we receive unexpected assistance in an indirect fashion from this Court.

In relatively recent time this Court decided the case of

Alford vs. U. S., 282 U. S. 687 (1930).

and in the course of the opinion in that case at p. 693 cited the case of

Rex vs. Watson, 32 Howell State Trial 284 (1817).

This case is also reported in a much more lawyerlike manner by that eminent authority on the law of evidence Starkie in

2 *Starkie* 150, 171 Reprint 640 (1817).

In a careful consideration of that case, which this Court has sanctioned in the manner above indicated, and reinforced by authorities immediately to be noticed, we assert the true common law rule to be *that a witness may be asked any question that may impeach his credibility except that which may incriminate him or expose him to a forfeiture or penalty upon claim of privilege upon these grounds by him* regardless of the character of the inquiry:

Phillips Evidence, 4th Am. edition Volume 2, pp. 947, 948, 949;
Starkie Evidence, 10th Am. edition 210 et seq. (1876).

and as it is firmly established that the credibility of witnesses is a question of fact for the jury

U. S. vs. Lotsch, 102 Fed. 2d 35 (1939);
U. S. vs. Hannon, 105 Fed. 2d 390 (1939);
Flowers vs. U. S., 83 Fed. 2d 78 (1936).

We submit, that whether a given question impeaches the credibility *is a question of fact* and not of law as indicated by the Court below. More than that we submit that to meet the requirements of this rule the subject of the inquiry is not confined to criminal acts whether they be felonies or misdemeanors and may be predicated upon the idiosyncrasies of the witness or other matters wholly outside of the realm of the administration of criminal law, save only, that in the judgment of the jurors alone these factors undermine the credibility.

(B) That if moral turpitude is a factor to undermine credibility, does the desertion of wife and children, made a misdemeanor and punishable by fine and imprisonment by law, constitute such moral turpitude.

When we were discussing some pages back the case of

Tla-Koo-Yel-Lee vs. United States, supra,

we reserved the question of the factor of moral turpitude as a quality impeaching credibility, and did so because the element of adultery as involved in that case measured by the prevalent civilized standards certainly constituted moral turpitude, but if the question was still open to the writer having regard to the fact that the parties to the liason were Indians, doubt upon this phase might be engendered in his mind until such time as he should be informed by authoritative ethnological sources touching the laws, habits, and customs pertaining to sex relations among Indians in the vicinity of Fort Wrangle in 1894, because a definition of moral turpitude seems almost as mercurial as that of crimen falsi, especially so, since research shows this Court has never defined moral turpitude. However that may be, the phrase has been defined, but without affording much comfort and satisfaction to any true student of the criminal law. The definition is, that moral turpitude is an act of baseness, vileness or depravity in private and social duties owing to fellow men or society in general, contrary to accepted and customary rules, and need not be punishable by law.

United States ex rel. vs. Uhl, 16 Fed. Supp. 429 (1936);

Ng Sui Wing vs. United States, 46 Fed. 2d 755 (1931);

United States ex rel. vs. Reimer, 30 Fed. Supp. 768 (1939).

It is strange indeed that this definition of moral turpitude should so closely coincide with what has been said a few lines back concerning the zone of permissible impeachment unlimited by consideration of the criminal law. We now stress moral turpitude because the term appears with great frequency in those cases upon which the Court below relies, but does not name, said to establish a majority rule and therefore the undertaking of the petitioner when he seeks to come into the purview and protection of the so-called majority cases need only demonstrate that desertion of wife and children constitute moral turpitude with or without statutory condemnation and that he does by inquiring whether such delinquency is not an act of baseness and depravity in private and social duties owing to the wife and children and the society of which they are members and is not contrary to accept it and customary rules touching such domestic relations. To this question there is but a single answer, and it is in the affirmative, and therefore, is strictly moral turpitude within the definitions of the cases last cited. More than this, as the Court below concedes, both in Pennsylvania the State in which the default occurred and in New Jersey where the cause was tried it is by statute denominated a misdemeanor, and is a misdemeanor of such importance that the statutes of both States prescribe a maximum fine of $500 and a maximum imprisonment of one year.

N. J. S. A. 2: 121-2 (1937);
18 *Purdon*, Section 4731;
(*Act of June 4, 1939*, P. L. 842 Section 731).

When we leave the zone of principle and enter the field of concrete adjudication, we find it laid down that a witness

may be asked for the purpose of impeaching his credibility upon cross-examination if he had been guilty of desertion.

Hamilton vs. People, 29 Mich. 173 (1874);
Jordan vs. State, 141 Ark. 504, 217 Southwestern 588 (1920).

There is still another approach to this question which will carry us to the same destination. It is in the domain of tort touching the offense of libel. We know that a charge involving moral turpitude and indictable is libelous per se

Pollard vs. Lyon, 91 U. S. 225 (1875);
Sipp vs. Coleman, 179 Fed. 997 (1910);

and we know that published words charging a wife with deserting her husband is libelous per se

Smith vs. Smith, 73 Mich. 445, 91 NW 499 (1889);

a fortiori, desertion of a spouse is an act of moral turpitude, consequently it was error to forbid the cross-examination of Leo DeLeone to disclose his moral turpitude where that turpitude in its inherent character showed mental and moral depravity.

Arnold vs. U. S., 94 Fed. 2d 506 (1938).

As we approach the conclusion of this phase of the argument it may be useful in passing to refer to that category of cases which by force in the reasoning of the Court below must be the minority cases. They are

Fisher vs. United States, 8 Fed. 2d 978 (1925) Certiorari denied. 271 U. S. 666;
Merrill vs. United States, 6 Fed. 2d 120 (1925);
United States vs. Liddy, 2 Fed. 2d 60 (1924);

and into this strange company likewise falls a case decided by the Court below, that is the Circuit Court of Appeals for the Third Circuit namely

> *Mausbach vs. United States*, 11 Fed. (2d) 224 (1926).

Of course, these four cases are free of the heresy of crimen falsi and probably do not contain any factor of moral turpitude as the same falls within the definition of that phrase, ante. They do involve misdemeanors, and cross-examination predicated thereon was held proper in each of the four instances. We, therefore, think that the Court below has fallen into error in its holding that the petitioner had no right to cross-examine the Government's witness Leo DeLeone as to the fact of his prior conviction for the desertion of his wife and children in Philadelphia and that this is plain reversible error

> *Alford vs. United States, supra;*
>
> *Arnold vs. United States, supra.*

After all, all that the petitioner strives for is a mere return to fundamentals, and these fundamentals in their original purity are best presented by the distinguished Chief Justice Taft while still in the 6th Circuit

> "The question whether the conviction of a felony was competent at common law to impeach the credibility of a witness could not arise because the witness was absolutely disqualified. When *as the conviction of a less crime than a felony had always been competent in impeachment* the conviction of a felony would a fortiori be relevant for the same purpose."

> *Baltimore & Ohio R. R. Co. vs. Rambo*, 59 Fed. 79 (1893);

and rescue the situation from the chaos which has driven Professor Wigmore into despair.

Wigmore on Evidence, 3rd edition, section 987.

(C) That a conviction of a convict of a criminal offense necessarily proves the convict to be the offender.

This Court may regard the petitioner's necessity to lay down the above proposition as frivolous or startling. This would certainly likewise be the writer's conclusion, but, for the fact that that part of the opinion of the Court below which has been made the basis of this argument when dealing with the effect with the proof of the conviction in regard thereto states "the fault in such regard might not even lie with the one (the convict) sought to be impeached." (Record p. 54)

This is truely baffling because we know that the judgment in the criminal case imports verity when collaterally assailed. Until corrected in a direct proceeding it says what it was meant to say, and this by an irrebuttable presumption. In any collateral inquiry a Court will close its ears to a suggestion that the sentence entered in the minutes is something other than the sentence of the Judge.

Hill vs. Wampler, 298 U. S. 464 (1935).

(D) That the refusal to permit by cross examination to show the conviction of crime by a Pennsylvania court for the purpose of impeachment in a trial in the Federal District Court for New Jersey violates the full faith and credit clause of the Constitution, Section 1, Article 4.

It is of course true that by reason of the action of the Trial Court in cutting off the cross-examination, made it impossible to offer the record of the Pennsylvania conviction and consequently it was not offered.

In that state of the record the petitioner contends that the proceedings in the Domestic Relations Court of Philadelphia against the Government's witness Leo DeLeone, by and in which he was convicted of deserting his wife and children was unquestionably a judicial proceeding of the State of Pennsylvania and no authorities are necessary to prove that. Since that is true, we submit that the action of the Court below in affirming the action of the trial Court in that particular in a tentative and undeveloped state in which the matter was cut off, accomplished the cutting off of all inquiry as to the proceedings, so that, no proper predicate could be laid for the introduction of the record thereof. Obviously such procedure then gave those proceedings no faith or credit whatsoever, and thus, effected the clearest violation of the simple words of this Constitutional mandate. The petitioner concedes that this provision of the Constitution is not self-executing and consequently to make it effective, revised statute 905 was passed and now constitutes section 28 U. S. C. A. 687. The Constitutional mandate and this section taken together demonstrate that the mischief of the present situation must clearly fall within its purview, but the petitioner is obliged to confess that his extended examination of the authorities reveals no precedent approximating the present situation. The

question is therefore novel and unique and being such presents the best reason why it should now be reviewed in this Court. There is however indicia which shows that the contention now raised is far from fantastic. That this is true, seems to us to be made manifest by the case of

People vs. Reese, 250 N. Y. Supp. 392, 232 App. Div. 624 (1931)

holding that a record of foreign criminal proceedings had, is admissible to show the criminal quality of an interested party in the subsequent criminal trial under the aegis of this Constitutional provision.

The soundness of this approach is demonstrated by the language of Taylor CJ in disposing of a somewhat analogous situation when he stated "As truth and justice are not confined by geographical limits but are co-extensive with the concerns and relations of civilized communities the crime which renders a witness incompetent in one country must do so in all."

State vs. Candler, 3 Hawks. 307 (NC 1824)

See also:

Federal Coal Co. vs. Royal Bank of Canada, 10 Fed. 2d 679 (1926);

and that we do not quite fill the role of pioneers in this direction, we think is proven by the Supreme Court of New Hampshire which in

Chase vs. Blodgett, 10 N. H. 22 (1838);

seems to hold that this is a necessary result under the full faith and credit clause of the Federal Constitution *supra*.

VI. CONCLUSION

The petitioner therefore contends in leaving the matter that the true and correct legal situation arising upon this record as tested by principle and authority is

(a) That in Federal Courts the doctrine of crimen falsi did not at the time of trial exist.

(b) That since the doctrine of crimen falsi was non-existent at the time of trial it could not become the basis of a limitation of the right of cross-examination.

(c) That for the purpose of impeachment of the credibility of a witness in the criminal case in the Federal Courts he may be asked anything which does not incriminate him or expose him to penalty of forfeiture.

(d) That if the right of cross-examination for the purpose of impeachment is limited by the factor of moral turpitude, the desertion of wife and children constitutes such moral turpitude with or without the condemnation of any criminal statute.

(e) That the record of criminal conviction irrebuttably shows that the convict is culpable as to every element essential to establish criminal responsibility.

(f) That the prohibition of cross-examination to show the conviction of the witness, sought to be impeached, by the Courts of Pennsylvania at the trial of the Federal Court of New Jersey was in direct violation of Section 1, Article 4 of the Federal Constitution.

All of which propositions, the petitioner submits, the Court below erroneously rejected or ignored and as all are of great public importance, the petitioner asserts that the case made by the present record urgently calls for

examination and revision by this Court for which reason the certiorari should issue as prayed for to the end and purpose that the judgment of the United States Court of Appeals for the Third Circuit and of the District Court of the United States for the District of New Jersey be reversed and the cause be remanded to the latter Court for a new trial.

Respectfully submitted,
JACOB WEINSTEIN,
Attorney for Edward Montgomery, Petitioner.

MICHAEL SERODY, ESQ.,
Of Counsel.
April 2, 1942.

INDEX

CITATIONS

457077—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1109

EDWARD MONTGOMERY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 30–36; 55–59) is reported in 126 F. (2d) 151.

JURISDICTION

The judgment of the circuit court of appeals was entered January 6, 1942 (R. 37). An order denying a petition for rehearing was entered on March 6, 1942 (R. 60). The petition for a writ of certiorari was filed on April 4, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court improperly refused to permit cross-examination of a Government witness as to a prior conviction for desertion, a misdemeanor.

STATEMENT

Upon an indictment in six counts petitioner was convicted upon the first and second counts (R. 10), charging, respectively, violations of 26 U. S. C. 1184 and 1162 (Internal Revenue Code, secs. 2833 and 2810), relating to distilling without giving bond and the registering of stills (Pet. 6). He was sentenced to 18 months' imprisonment and a fine of $500 on count 1 and 18 months' imprisonment, a fine of $100 and a penalty of $500 on count 2, the terms of imprisonment to run concurrently (R. 11). Upon appeal the judgment of conviction was affirmed (R. 37, 59).

The question involved herein arose under the following circumstances: During the cross-examination of a rebuttal witness for the Government, the trial court sustained the objection of the United States Attorney to the question, asked to impeach the witness' credibility, whether he had been "convicted and an order" made against him by the Domestic Relations Court of Philadelphia (R. 27).[1]

[1] No exception was taken by petitioner and the incident was not brought into the record by bill of exceptions (see R. 26–27) under Rule IX of the Criminal Appeals Rules. The question was, however, considered by the Circuit Court of Appeals and we therefore discuss it.

The record does not disclose for what crime the witness was allegedly convicted (see R. 13), but petitioner states that he was attempting to question the witness concerning his conviction for the desertion of his wife and children, a misdemeanor (Pet. 5).

ARGUMENT

The holding of the circuit court of appeals that the witness' credibility could not be impeached by showing a prior conviction for desertion, a misdemeanor not *crimen falsi* (R. 58), is plainly correct and does not present any conflict of decisions warranting certiorari.

In *Wolfle* v. *United States*, 291 U. S. 7, 12, this Court stated that, in the absence of congressional legislation,[2] the admissibility of evidence in a criminal proceeding is "governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience. *Funk* v. *United States*, 290 U. S. 371."

As the court below held (R. 58) "the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, [is] that it is only convictions for felony or misdemeanors amounting to *crimen falsi* which are admissible to impeach a witness' credibility."[3] Cf.

[2] There is no congressional legislation relating to the question.

[3] *Tla-Koo-Yel-Lee* v. *United States*, 167 U. S. 274, relied upon by petitioner as supporting a contrary rule (Pet. 25), held only that it was improper not to allow the defendant to show, by cross-examination, that the witness was biased

Melaragno v. *United States*, 88 F. (2d) 264, 265 (C. C. A. 3); *Verro* v. *United States*, 95 F. (2d) 504 (C. C. A. 3); *Bartos* v. *United States District Court*, 19 F. (2d) 722, 724 (C. C. A. 8).[4] In *Funk* v. *United States*, 290 U. S. 371, 381, this Court stated that "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." We submit that a prior conviction for desertion[5] bears no relationship to a witness' veracity and in no sense warrants the impeachment of his credibility on that ground.

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against him and her former husband, whom she implicated in the crime, by reason of her illicit relations with another witness for the prosecution. No question as to the right of the defendant to impeach the witness' veracity on the ground of a prior conviction for adultery, a felony (Carter's Ann. Alaska Codes (1900) Part I, sec. 121), was involved.

[4] See also *Middleton* v. *United States*, 49 F. (2d) 538, 540 (C. C. A. 8); *Pittman* v. *United States*, 42 F. (2d) 793, 795 (C. C. A. 8); *Scaffidi* v. *United States*, 37 F. (2d) 203, 211 (C. C. A. 1); *Fay* v. *United States*, 22 F. (2d) 740–741 (C. C. A. 9); *Lawrence* v. *United States*, 18 F. (2d) 407, 408 (C. C. A. 8); *Haussener* v. *United States*, 4 F. (2d) 884, 887 (C. C. A. 8); *Neal* v. *United States*, 1 F. (2d) 637, 639 (C. C. A. 8); *Solomon* v. *United States*, 297 Fed. 82, 92 (C. C. A. 1). The cases from each of the circuit are collected in III Wigmore, *Evidence* (3d ed. 1940), sec. 987, pp. 574–575. See also *Thomas* v. *Devine*, 104 N. J. L. 361, 364; *State* v. *Block*, 119 N. J. L. 277, 282.

[5] As is pointed out in Wharton, *Criminal Law* (12th ed. 1932), section 1850, the primary purpose of laws relating to desertion is to secure the support of the family and prevent it from becoming a public charge. *Commonwealth* v. *Shankel*, 19 Atl. (2d) 493, 494 (Pa.); *Commonwealth* v. *Leonard*, 93 Pa. Super. 21.

CONCLUSION

The case was correctly decided below, and there is involved no conflict of decisions or any important question of federal law. We therefore respectfully submit that the petition for a writ of certiorari be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
HENRY J. FOX,
Attorneys.

APRIL 1942.

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